

1
2
3 IN THE UNITED STATES BANKRUPTCY COURT
4 FOR THE DISTRICT OF ARIZONA
5

6 In Re

7 RONALD T. OSBORNE and
8 SHELLY L. OSBORNE,

9 Debtors.
10

Chapter 13

Case No. 05-7212

**ORDER DENYING MOTION FOR
RECONSIDERATION**

11 **I. Preliminary Statement**

12 This matter comes before the Court pursuant to a "Motion for Reconsideration
13 of Memorandum Decision and to Request Court to Certify Question to the Arizona Supreme
14 Court" ("Motion for Reconsideration") filed by the Arizona Department of Revenue
15 ("ADOR") on April 10, 2006. On April 11, 2006, the Debtors filed "Debtors' Response to
16 Motion to Reconsider Memorandum Decision and to Request Court to Certify Question to the
17 Arizona Supreme Court" ("Response"). On April 19, 2006, the ADOR filed its "Reply to
18 Debtors' Response to Motion to Reconsider Memorandum Decision and Request Court to
19 Certify Question to the Arizona Supreme Court" ("Reply"). The Motion for Reconsideration
20 is based on this Court's Memorandum Decision issued March 30, 2006. (the "Decision") The
21 ADOR made no request for a hearing in this matter. The Court was not aware of the Motion
22 for Reconsideration until it received a phone call from Debtors' counsel inquiring as to the
23 status of the Motion.¹ The Court has now reviewed the Motion for Reconsideration and has
24 reached its decision.
25

26
27 ¹ Because the Arizona Bankruptcy Court is a "paperless court," a motion which is
28 electronically filed by the attorney requires the attorney to notify the court of the filing
pursuant to General Orders of the Court, as amended. The Court does periodically search its
entire database for unresolved matters, but this is a time consuming effort which takes some
time to uncover and resolve.

1 In this Memorandum Decision, the Court has set forth its findings of fact and
2 conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues
3 addressed herein constitute a core proceeding over which this Court has jurisdiction. 28
4 U.S.C. §§ 1334(b) and 157(b) (West 2006).

5 6 **II. Discussion**

7 Fed. R. Civ. P. 59 lists the grounds for motions filed under it as being "any of
8 the reasons for which new trials have heretofore been granted . . ." FRCP 59(a). This section
9 has generally been interpreted to provide three grounds for granting Fed. R. Civ. P. 59
10 motions: (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered
11 evidence. School Dist. No. IJ Multnomah County, OR v. AcandS, Inc., 5 F.3d 1255, 1263
12 (9th Cir. 1993); In re Gurr, 194 B.R. 474 (Bankr.D.Ariz. 1996). A motion for
13 reconsideration is not specifically contemplated by the Federal Rules. To the extent it is
14 considered by the Court, it is under Fed. R. Civ. P. 59(e) to alter or amend an order or
15 judgment. In re Curry and Sorensen, Inc., 57 B.R. 824, 827 (Bankr. 9th Cir. 1986).

16 Reconsideration is appropriate if the court is presented with newly discovered
17 evidence, committed clear error or the initial decision was manifestly unjust, or there is an
18 intervening change in controlling law. School Dist. No. IJ Multnomah County, OR v.
19 AcandS, Inc., 5 F.3d 1255,1263 (9th Cir. 1993). A motion for reconsideration may properly
20 be denied when the motion fails to state new law or facts. In re St. Paul Self Storage Ltd.
21 Partnership, 185 B.R. 580 (9th Cir.BAP 1995).

22 The ADOR requests the Court to reconsider its Decision on three grounds: 1)
23 no Arizona appellate court has yet interpreted the Arizona statutes that were considered in this
24 case; 2) the Court's interpretation is inconsistent with the Arizona Tax Court decisions; and 3)
25 the Court's decision is inconsistent with the Arizona state tax statutes.

26 The Court incorporates the factual discussion as set forth in its Decision, which
27 reflects that the facts were undisputed. Rather, the parties requested a legal interpretation of
28

1 A.R.S. §42-5028. Did that provision require an individual shareholder of a corporate
2 taxpayer be liable for the additional charges that the merchant should have accounted for and
3 remitted to the State. The Court, relying in part on In re Inselman, 334 B.R. 267 (Bankr. Ariz.
4 2005), held that "A.R.S. §42-5028 imposes liability only upon the merchant/taxpayer who
5 engages in the transaction that gives rise to the tax, and not upon the officers, employees or
6 agents of such separate business entity." Memorandum Decision at p. 7.

7 Now the ADOR alleges that this Court was not the proper court to interpret
8 and apply §42-5028. The ADOR requests that this Court certify the question to the Arizona
9 Supreme Court pursuant to A.R.S. §12-1861 which states:

10 The supreme court may answer questions of law certified to it by the supreme
11 court of the United States, a court of appeals of the United States, a United
12 States district court or a tribal court when requested by the certifying court if
13 there are involved in any proceedings before the certifying court questions of
14 law of this state which may be determinative of the cause then pending in the
15 certifying court and to which it appears to the certifying court there is no
16 controlling precedent in the decisions of the supreme court and the
17 intermediate appellate courts of the state.

18 The State of Arizona does accept certified questions from the Bankruptcy Court. In re Krohn,
19 203 Ariz 205, 206 (Ariz. 2002). However, for this Court to certify a question, it must first
20 conclude that there is a "cause...pending in the certifying court."

21 The term "pending" is defined as "remaining undecided; awaiting decision".
22 Black's Law Dictionary 1169 (Bryan A. Garner ed., 8th ed., West 2004). Here, there is no
23 cause pending. The "cause" before the Court began with the "Partial Objection by Debtors to
24 First Amended Proof of Claim " filed by the ADOR on June 24, 2005. The cause remained
25 pending for several months during the course of the hearings, motions and the oral argument
26 conducted on October 26, 2005. However, once the Court issued its Decision, there was
27 nothing remaining undecided or awaiting decision. Thus, this Court must deny ADOR's
28 current request for certification as being untimely.

Assuming, that the Court did consider the matter still pending, the ADOR
does not meet the statutory requirements of A.R.S. §12-1861. For a question to be certified, it
must "[appear] to the certifying court there is no controlling precedent in the decisions of the

1 supreme court and the intermediate appellate courts of the state." Here, the Court has found
2 sufficient controlling precedent. In the Court's Decision, it explores, interprets and applies
3 Arizona law extensively. The Court considered several Arizona court decisions as they
4 applied to the transaction privilege tax.² Therefore, Arizona law is sufficiently well
5 developed on the matter to negate certification to the Arizona Supreme Court, and the
6 ADOR's request must be denied

7 Next, the ADOR refers to existing unpublished Arizona Tax Court decisions
8 that have reached a contrary decision to this Court's Decision. The federal courts may
9 consider unpublished decisions pursuant to U.S.Ct. of App. 9th Cir. Rule 36-3, 28 U.S.C.A.,
10 "however such decisions are not binding and are at most persuasive authority." In re Van
11 Wagoner Funds, Inc. Securities Litigation, 382 F.Supp.2d 1173, 1182 fn. 5 (N.D.Cal 2004)
12 (internal citations omitted).³ This Court has reviewed the electronic docket and can find no

13 _____
14 **2** See pages 3 and 4 of the Decision in which the Court cited to People of Faith Inc. v.
15 Arizona Dept. of Revenue, 161 Ariz. 514 (Tax Ct. 1989); Tower Plaza Investments Limited v.
16 DeWitt, 109 Ariz. 248 (1973); Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389
17 (1955); State v. Garcia, 189 Ariz. 510 (App.1997); People's Choice TV Corp., Inc. v. City of
18 Tucson, 202 Ariz. 401 (2002); Mail Boxes, Etc., U.S.A. v. Industrial Comm'n, 181 Ariz. 119,
19 121 (1995); Wilderness World, Inc. v. Department of Revenue State, 182 Ariz. 196 (1995);
20 State ex rel. Arizona Dep't of Revenue v. Phoenix Lodge No. 708, Loyal Order of Moose,
21 Inc., 187 Ariz. 242, 247 (App.1996); A.R.S. § 42-5008; A.R.S. § 42-5024; and A.R.S. § 42-
22 5028

23 **3** Rule 36-3 states:

24 (a) Not Precedent. Unpublished dispositions and orders of this Court are not
25 binding precedent, except when relevant under the doctrine of law of the
26 case, res judicata, and collateral estoppel.

27 (b) Citation. Unpublished dispositions and orders of this Court may not be
28 cited to or by the courts of this circuit, except in the following
circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit
when relevant under the doctrine of law of the case, res judicata, or
collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for
factual purposes, such as to show double jeopardy, sanctionable conduct,
notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or
order made pursuant to Circuit Rule 36-4, or in a petition for panel

1 previous references by the ADOR to these unpublished decisions. Moreover, even in its
2 current Motion, the ADOR does not reference or attach these specific unpublished decisions.
3 Even if the ADOR had made the cases available to this Court, at this point in the proceedings,
4 the Court is under no obligation to consider these decisions.

5 Finally, another Arizona bankruptcy court judge in the decision of In re
6 Inselman, *supra*, faced precisely the same issue as this Court. As noted in the Decision, the
7 Inselman Court, using similar reasoning, reached the same conclusion as this Court in the
8 current matter. This Court has reviewed the electronic docket in the Inselman matter. The
9 Inselman matter was taken under advisement on October 27, 2005, the day after this matter
10 was taken under advisement. No motion for reconsideration was filed; no request for
11 certification was made.⁴ A motion for reconsideration may properly be denied when the
12 motion fails to state new law or facts. *See In re St. Paul Self Storage Ltd. Partnership, supra.*
13 As such, the Motion for Reconsideration is denied.

14 15 **III. Conclusion**

16
17 Based upon the foregoing, the Court concludes that the ADOR's Motion for
18 Reconsideration is without merit. There is no pending cause before the Court, and there is
19 sufficient precedent under Arizona law for this Court to reach its decision. Accordingly,
20 certifying a question to the Arizona Supreme Court is inappropriate. Moreover, the ADOR
21 has failed to show that this Court misinterpreted Arizona tax law concerning the matter at

22
23
24 rehearing or rehearing en banc, in order to demonstrate the existence of a
conflict among opinions, dispositions, or orders.

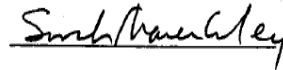
25 (c) Attach Copy. A copy of any cited unpublished disposition or order must
26 be attached to the document in which it is cited, as an appendix.

27 ⁴ The Court finds it curious that a request for certification and a request that this Court
28 follow unpublished decisions is made only in this matter. In any event, the ADOR has set
forth no new issues of law or fact for the Court to consider.

1 hand. As such, the ADOR has failed to meet its burden in persuading the Court to reconsider
2 its Decision.

3 Therefore, the Motion for Reconsider and Request to Certify Question is
4 DENIED.

5
6 DATED this 28th day of July, 2006.

7 

8 Honorable Sarah Sharer Curley
9 U. S. Bankruptcy Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28